

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:MSR:ILD:CHI:TL-N-1047-99
RAVillageliu

VIA REGULAR MAIL & FACSIMILE MAIL

date: February 19, 1999

to: Chief, Examination Division, Illinois District
Edna Manson, Case manager, E:CEB:1104:19
IRS, 860 E. Algonquin Road, Schaumburg, IL 60173
Attn: Irwin Shudnow, Case Coordinator

from: District Counsel, Illinois District

subject: AO: [REDACTED] ([REDACTED]) Extension of statute for Form 1042
Years: [REDACTED] and [REDACTED]

Non-Docketed Large Case¹

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this

¹ This case presents principles of law on which we have received clear, well established national office guidance, through the years. We feel that our opinion is well grounded on their past teachings. However, be advised that, the instant opinion is only the opinion of district counsel, Illinois, without the benefit of national office review. A copy of this opinion is being sent to the national office for coordination purposes only, and not for FSA. You have indicated that you need an answer now, given the imminent expiration of the statutes at issue. Be advised, however, that this opinion may not be our final word. The issue of who the proper agent is to sign statute extensions, after a reorganization, is inherently complex, and has system-wide implications. The national office may notice something we missed, or suggest modifications. If this occurs and impacts, we will notify you. The national office's opinion would then become part of our opinion to you, and we would expect you to take our national office's view into account.

case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. **This particular advice may be disclosed to taxpayers or their representatives, if it facilitates your obtaining the statute extension which the Service desires.**

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

FACTS

The Service wants to extend the statute for [REDACTED]'s Company², a Delaware corporation, Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, for the taxable years [REDACTED] and [REDACTED]. During [REDACTED] and [REDACTED], [REDACTED] was a member of the consolidated return group headed by [REDACTED] (formerly known as [REDACTED]), EIN: [REDACTED], a Delaware corporation. On [REDACTED], [REDACTED], EIN: [REDACTED], reorganized, pursuant to a plan of reorganization allegedly qualifying under I.R.C. Section 368(a)(1)(C) or (D). Pursuant to the plan of reorganization and under Delaware law, the consolidated group common parent, [REDACTED], EIN: [REDACTED], liquidated.³ The common parent's

² According to the State of Delaware amendment certificate filed on [REDACTED], the company changed its name from "[REDACTED]" to "[REDACTED]."

³As it is usual in reorganizations involving multicorporate groups, the parties add to the reigning confusion by trading names back and forth. This case is no exception. [REDACTED], EIN: [REDACTED], a Delaware corporation, was the surviving corporation of the [REDACTED] reorganization merger. At the time of the merger, [REDACTED] was only a subsidiary of the liquidating consolidated return common parent (for the years [REDACTED]) [REDACTED], EIN: [REDACTED]. "[REDACTED]" EIN [REDACTED], however, had been the consolidated return group common parent for the years [REDACTED] through [REDACTED]. During the years when [REDACTED], EIN: [REDACTED], was the common parent, the company's name was [REDACTED]. On [REDACTED], the company changed its name from "[REDACTED]" to "[REDACTED]."

certificate of dissolution was filed with the State of Delaware and became effective on [REDACTED]. We understand that the [REDACTED] group has informed the Revenue Agent that the common parent did not designate another member of the group as agent for the members of the group for taxable years ending prior to its dissolution and that the remaining members have not yet designated a new agent for the members of the group.⁴

The [REDACTED] Form 1042 shows the taxpayer's name as "[REDACTED] (formerly [REDACTED])." The [REDACTED] Form 1042 shows the taxpayer's name simply as "[REDACTED]"

ISSUE

1. Who is the proper agent to sign an extension of the statute of limitations for the Form 1042 liability for [REDACTED] and [REDACTED] where the common parent has gone out of existence?

Answer: [REDACTED] for both [REDACTED] and [REDACTED].

2. Provide the language for the Form 872 or 872A.

Answer: If you are planning to extend the statute with respect to every type of income tax liability, you really do not need to modify the Form 872 or Form 872A. However, there is no harm if as a protective measure, you add a reference to Form 1042, by modifying the words "any return(s)" by adding above it, "including Form 1042."

If you want to **extend the statute for Form 1042 tax only**, the consent Forms 872 or 872A should be altered by deleting the words "any return(s)" and adding above them "Form 1042."

3. Provide the name of the taxpayer to use in the Forms 872 or 872A.

[REDACTED]. " This is probably because it was no longer the common parent (for [REDACTED]). After the [REDACTED] reorganization merger, [REDACTED] resumed its role of common parent for subsequent years. [REDACTED] also recovered its name. On [REDACTED], it changed its name form "[REDACTED]" to "[REDACTED]".

⁴After the Revenue Agent contacted the [REDACTED] group, they are considering designating a new agent to facilitate future extensions.

Answer: One way of listing the taxpayer's name that works whether you use separate Forms 872 or 872A for each [REDACTED] and [REDACTED], or a single Form 872 or 872A for both years is, as follows:

[REDACTED] (formerly known as [REDACTED]),
EIN: [REDACTED].

LEGAL OPINION AND DISCUSSION

When the common parent goes out of existence, the common parent can designate another member of the group as agent for the members of the group for taxable years ending prior to its dissolution or, if the common parent goes out of existence without making a designation, the remaining members may designate a new agent for the members of the group. Neither happened in this case. Given that the common parent or the remaining members have not designated an agent for the consolidated group, the district director may deal with each member of the group individually. See Treas. Reg. Section 1.1502-77(a) or - 77(d). Therefore, you need to seek the Form 872 or 872A extension with respect to the Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, directly from "[REDACTED]."

If and when the group designates an agent, you will want to solicit an additional extension from that agent also, but only as a protective measure. As long as you get a valid one from "[REDACTED]" at this time, the statute is protected. The reason why this is so is because there is no agent in existence at this time, and you are authorized to deal directly and individually with [REDACTED], the consolidated return member.⁵

Please note that even if the consolidated return parent had remained in existence, or a new one been designated, in this case, we still would have recommended that you seek an extension from [REDACTED] directly, as a precautionary measure. We would not have recommended that you simply rely on one from the common parent or other agent. The reason why is because the liability involved is a Form 1042 liability, a strange creature. A contentious taxpayer could raise the legal argument that a plain vanilla consolidated Form 872 or Form 872-A is not intended to

⁵While the regulation does not require notification to the old common parent under Treas. Reg. Section 1.1502-77(d), as a protective matter, the district director should notify the old dissolved common parent [REDACTED] in writing, at its last known address, that it intends to deal with [REDACTED] directly.

cover the Form 1042 tax liability, because the liability is a **de facto** or **functionally** a withholding agent's liability and not an income tax liability per se. In our opinion, this argument would be won by the Service in Court because the withholding of tax at its source (I.R.C. Sections 1441-1442) is classified as an "Income Tax" under Subtitle A, Chapter 3, of the Code. But why risk any uncertainty? A stitch in time saves nine makes a lot of sense in legal matters.

You also asked us to advise you with respect to how to set forth the taxpayer's name in the Form(s) 872 or 872A.

The general principle to guide us is to use the same corporate name in the consent that the taxpayer uses, in the particular return, for which the statute is being extended. This is not the whole story because taxpayer's sometimes fail to use their proper corporate names or had various name changes.

If the taxpayer has changed its name since the time of the return, it is best to start with the present name of the taxpayer and work back until you get to the name that the taxpayer uses in the return in question. Adding EIN numbers, at various places, is **optional**, but very helpful where you have multiple names, and you need to make clear that they are either one copy or a successor-in-interest to another company whose name is listed in the return and in the consent.

From the above general principles, it should be clear that various ways of writing the taxpayer's name can all be equally legally valid. To an extent, different styles can best accomplish different purposes. The essential idea is to make a clear connection between the name used in the return(s) in question and the name(s) used in the consents. Ideally, anyone looking at both documents should see the connection without any special training in corporate reorganizations or transferee liability principles.

Applying these principles in this case, one option you have is to have one single Form 872 or 872A, covering both tax years [REDACTED] and [REDACTED]. If you use one form for both years [REDACTED] and [REDACTED], you can show the taxpayer's name as follows:

[REDACTED] (formerly known as [REDACTED]),

EIN: [REDACTED].⁶

Another option you have is to have two separate Forms 872 or 872A, one for the year [REDACTED] and one for the year [REDACTED]. If you have a separate form for each year, you can show the taxpayer's name for [REDACTED], and also for [REDACTED], the same as you did for the one form covering both [REDACTED] and [REDACTED], as follows:

[REDACTED] (formerly known as [REDACTED]),
EIN: [REDACTED].

At your option, since the [REDACTED] Form 1042 does not mention the [REDACTED], as the taxpayer's name, you can safely omit that name in the separate form that covers only the year [REDACTED]. This means that in the [REDACTED] consent you could simply show the taxpayer's name, as follows:

[REDACTED]

CONCLUSION

This opinion is being sent to you by facsimile transmission, per your request, and by regular mail. The legal file with respect to the particular legal questions covered in this opinion is being closed in this office. If you have further questions, please contact the undersigned at (312) 8867-9225, ext. 308. The other relatively less pressing consent questions, involving other [REDACTED] subsidiaries differently situated, are being handled by separate opinion. We expect to have them complete and

⁶Just as good would be [REDACTED] (EIN: [REDACTED]), formerly known as [REDACTED] (EIN: [REDACTED]). In the instant case, where we have only two names, repeating the EIN twice may be an overkill. Please also note that there are a myriad other ways of substituting parentheses for commas, or omitting them altogether, all of which can result in legally sufficient statements of the taxpayer's name. Therefore, we do not mean to imply that you must use only the above formulations. Just be grammatically clear and use the exact legal name(s) of the taxpayer and if different from the name as used in the return, it makes sense to connect them. The key is to always include the last known legal name and, if different, the name as actually written used in the return(s) in question.

⁷You would not need to list its EIN, there is only one name. Compulsive people may prefer "[REDACTED] (EIN: [REDACTED])".

sent to you sometime in the next week.

RICHARD A. WITKOWSKI
District Counsel

By: /s/ ROGELIO A. VILLAGELIU
ROGELIO A. VILLAGELIU
Special Litigation Assistant

Attachments: None.

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a:\[REDACTED].wpd